

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROSE M. LIPKO,	:	
	:	CIVIL NO. 3:01-CV-1237
Plaintiff,	:	
	:	
v.	:	(JUDGE CONABOY)
	:	(Magistrate Judge Smyser)
JO ANNE B. BARNHART,	:	
Commissioner of Social	:	
Security,	:	
	:	
Defendant.	:	

ORDER

BACKGROUND OF THIS ORDER:

The above-captioned matter involves Plaintiff's application to receive benefits under the Black Lung Part B program pursuant to 30 U.S.C. § 923(b) and her appeal of the denial of benefits filed pursuant to 42 U.S.C. § 405(g). Having been found disabled beginning on October 1, 1990, Plaintiff receives Disability Insurance Benefits ("DIB"). (See, e.g., Doc. 18 at 3.) At issue in this case is whether Plaintiff is entitled to receive Black Lung Benefits as a surviving child who was under a disability which began before the age of twenty-two. (Doc. 19 at 10 (citing 30 U.S.C. § 902(g)(2)(B)).)

On January 9, 2002, this Court issued an Order granting Defendant's motion to remand the case for further consideration. (R. at 332-34.) Upon remand, a second administrative hearing was held and, on January 31, 2003, the ALJ issued a decision denying Plaintiff Black Lung Benefits. (Doc. 19 at 8.) The ALJ's decision

became the final decision of the Commissioner on April 7, 2004, when the Office of Hearings and Appeals refused to assume jurisdiction. (Id. at 8-9.)

On November 19, 2004, Defendant filed a Motion to Reopen, (Doc. 11), which the Court granted by Order of November 22, 2004, (Doc. 12).

On January 14, 2005, Plaintiff filed a Motion for Summary Judgment and supporting brief, (Doc. 17), and on February 14, 2005, Defendant filed a brief in opposition, (Doc. 18). The Magistrate Judge issued his Report and Recommendation on April 29, 2005, recommending that the Court deny Plaintiff's motion for summary judgment, affirm the decision of the Commissioner and close the case. (Doc. 19.)

No objections have been filed to the Magistrate Judge's Report and Recommendation and the time for such filing has passed. Therefore, this matter is now ripe for disposition.

When a magistrate judge makes a finding or ruling on a motion or issue, his determination should become that of the court unless objections are filed. See Thomas v. Arn, 474 U.S. 140, 150-53 (1985). Moreover, when no objections are filed, the district court is required only to review the record for "clear error" prior to accepting a magistrate judge's recommendation. See Cruz v. Chater, 990 F. Supp. 375, 378 (M.D. Pa. 1998); Oldrati v. Apfel, 33 F. Supp. 2d 397, 399 (E.D. Pa. 1998).

The Magistrate Judge concludes that earnings records support the ALJ's finding that Plaintiff engaged in substantial gainful

work activity in 1962, 1963, and from 1968 through 1990 and, therefore, she does not meet the definition of "child under a disability" which would entitle her to Black Lung benefits. (Doc. 19 at 13-16.) We find no clear error in the Magistrate Judge's conclusion that the ALJ's determination is supported by substantial evidence in light of the fact that Plaintiff would only be eligible for black lung benefits if she was permanently disabled before age twenty-two and *continuously remained so* until the present time. See Kidda v. Director, Office of Workers' Compensation Programs, 769 F.2d 165, 167-68 (3d Cir. 1985). Plaintiff's earnings records are substantial evidence that she was not *continuously* disabled as defined by relevant authority.

ACCORDINGLY, THIS 26ht DAY OF MAY 2005, THE FOLLOWING ORDER IS ENTERED:

1. The Magistrate Judge's Report and Recommendation, (Doc. 19) is ADOPTED;
2. Plaintiff's Motion for Summary Judgment, (Doc. 17), is DENIED;
3. The decision of the COMMISSIONER is AFFIRMED;
4. The Clerk of Court is directed to close this case.

S/Richard P. Conaboy
RICHARD P. CONABOY
United States District Judge